UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MARCIA L. ROLLAND, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of the Social Security Administration, Defendant.	NO: 2:15-CV-103-RMP ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are Plaintiff Marcia L. Rolland's Motion for Summary Judgment, **ECF No. 12**, and Defendant Carolyn W. Colvin's Motion for Summary Judgment, **ECF No. 14**. The Court has reviewed the motions and the administrative record and is fully informed.

BACKGROUND

Marcia L. Rolland protectively filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on January 27, 2012, alleging disability since April 1, 2010, due to a lack of impulse control, obsessive compulsive disorder (OCD), abuse issues, and recovering from anorexia. ECF No.

8-5 at 2-14, ECF No. 8-6 at 7, Tr. 145-157, 175. The applications were denied initially and upon reconsideration. ECF No. 8-4 at 2-8, 11-14, Tr. 105-111, 114-117. Ms. Rolland requested a hearing on July 11, 2012. ECF No. 8-4 at 19-20, Tr. 122-123. Administrative Law Judge (ALJ) R.J. Payne held a hearing on October 31, 2013, at which Ms. Rolland, represented by counsel, and medical expert, Margaret Moore, Ph.D., testified. ECF No. 8-2 at 34-67, Tr. 33-66.

The ALJ issued an unfavorable decision on November 22, 2013, finding Ms. Rolland was not disabled as defined in the Social Security Act. ECF No. 8-2 at 14-24, Tr. 13-23. The ALJ found that Ms. Rolland had not engaged in substantial gainful activity since April 1, 2010, the alleged date of onset. ECF No. 8-2 at 16, Tr. 15. Further, the ALJ determined that Ms. Rolland had the following severe impairments: anxiety disorder and OCD. *Id*.

However, the ALJ found that Ms. Rolland did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. ECF No. 8-2 at 18-19, Tr. 17-18. The ALJ further found that Ms. Rolland had the residual function capacity (RFC) to perform a full range of work at all exertional levels with the following non-exertional limitations: "she can perform simple to moderately detailed work, with clearly stated goals and only occasional contact with co-workers, supervisors, and the general public." ECF No. 8-2 at 19, Tr. 18.

The ALJ identified Ms. Rolland's past relevant work as a count team/pull-tabs/bookkeeper. ECF No. 8-2 at 22, Tr. 21. Given Ms. Rolland's age, education, work experience, and RFC, the ALJ found that she was able to perform her past relevant work as a count team/pull-tabs/bookkeeper. *Id*. Next, the ALJ found that, in the alternative, that considering Ms. Rolland's age, education, work experience and RFC, and based on the Medical-Vocational Guidelines (grids) under the framework of section 204.00, a finding of "not disabled" was appropriate. ECF No. 8-2 at 23, Tr. 22.

Thus, the ALJ concluded that Ms. Rolland was not under a disability within the meaning of the Social Security Act at any time from April 1, 2010, through the date of the ALJ's decision. ECF No. 8-2 at 23, Tr. 22.

Ms. Rolland filed a request for review by the Appeals Council, which was denied on February 23, 2015. ECF No. 8-2 at 2-8, Tr. 1-7. Ms. Rolland filed a complaint in the District Court for the Eastern District of Washington on April 15, 2015. ECF No. 1, 3. The Commissioner answered the complaint on June 17, 2015. ECF No. 7. This matter is therefore properly before the Court pursuant to 42 U.S.C. § 405(g). Ms. Rolland filed a motion for summary judgment on October 15, 2015. ECF No. 12. The Commissioner filed a cross motion for summary judgment on December 3, 2015. ECF No. 14.

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here. Ms. Rolland was 32 years old at the alleged date of onset, April 1, 2010. ECF No. 8-5 at 2, Tr. 145. She completed the twelfth grade in 1996. ECF No. 8-6 at 8, Tr. 176. Ms. Rolland reported she stopped working in November 2011 because of her conditions. ECF No. 8-6 at 7, Tr. 175.

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's final decision. 42 U.S.C. § 405(g). A reviewing court must uphold the Commissioner's decision, determined by an ALJ, when the decision is supported by substantial evidence and not based on legal error. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). Substantial evidence is more than a mere scintilla, but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation omitted).

The reviewing court should uphold "such inferences and conclusions as the [Commissioner] may reasonably draw from the evidence." *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the Commissioner's decision. *Weetman v.*

Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); *see also Green v. Heckler*, 803 F.2d 528, 530 (9th Cir. 1986) ("This court must consider the record as a whole, weighing both the evidence that supports and detracts from the [Commissioner's] conclusion."). "[T]he key question is not whether there is substantial evidence that could support a finding of disability, but whether there is substantial evidence to support the Commissioner's actual finding that claimant is not disabled." *Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997).

It is the role of the trier of fact, not the reviewing court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the reviewing court may not substitute its judgment for that of the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229–30 (9th Cir. 1987).

SEQUENTIAL PROCESS

Under the Social Security Act (the "Act"),

> an individual shall be considered to be disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if her impairments are of such severity that the claimant is not only unable to do her previous work but cannot, considering the claimant's age, education, and work experience, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B). "Thus, the definition of disability consists of both medical and vocational components." *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4). Step one determines if the claimant is engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i).

If the claimant is not engaged in substantial gainful activities, the ALJ, under step two, determines whether the claimant has a medically severe impairment or combination of impairments. If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. 20 C.F.R. §§ 404.1520(a)(4)(ii) and 416.920(a)(4)(ii).

If the impairment is severe, the evaluation proceeds to step three, which compares the claimant's impairment to a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and 416.920(a)(4)(iii); see also

20 C.F.R. §§ 404, Subpt. P, App. 1 and 416, Subpt. I, App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. 20 C.F.R. §§ 404.1520(a)(4)(iii) and 416.920(a)(4)(iii).

Before proceeding to step four, the claimant's RFC is assessed. 20 C.F.R. §§ 404.1545(a)(1) and 416.945(a)(1). An individual's RFC is the ability to do physical and mental work activities on a sustained basis despite limitations from any impairments. 20 C.F.R. §§ 404.1545(a)(1) and 416.945(a)(1).

If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to step four, where the ALJ determines whether the impairment prevents the claimant from performing work she has performed in the past. If the claimant is able to perform her previous work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv) and 416.920(a)(4)(iv).

If the claimant cannot perform her previous work, the final step considers whether the claimant is able to perform other work in the national economy in light of her RFC, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

At step five, the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work, and (2) specific jobs exist in the national economy which the claimant can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).

ISSUES

Ms. Rolland alleges that the ALJ committed reversible error by (1) improperly weighing medical source opinions, (2) improperly rejecting the testimony of Ms. Rolland's mother, (3) failing to consider all of Ms. Rolland's limitation in the RFC determination, (4) finding Ms. Rolland's past job as a count team/pull-tab/bookkeeper qualified as past relevant work, and (5) applying the grids despite Ms. Rolland's non-exertional limitations.

I. Medical Source Opinions

Plaintiff challenges the weight given to the opinions of Kimberly Cole, Psy.D., Margaret Moore, Ph.D., and Joni Marsh, ARNP. ECF No. 12 at 4-15.

In weighing medical source opinions, the ALJ should distinguish between three different types of physicians: (1) treating physicians, who actually treat the claimant; (2) examining physicians, who examine but do not treat the claimant; and, (3) nonexamining physicians who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more weight to the opinion of a treating physician than to the opinion of an examining physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give more weight to the opinion of an examining physician than to the opinion of a nonexamining physician. *Id.*

When an examining physician's opinion is not contradicted by another physician, the ALJ may reject the opinion only for "clear and convincing" reasons.

Lester, 81 F.2d at 830. When an examining physician's opinion is contradicted by another physician, the ALJ is only required to provide "specific and legitimate reasons" for rejecting the opinion. *Id*. at 830-831.

The specific and legitimate standard can be met by the ALJ setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his conclusions, he "must set forth his interpretations and explain why they, rather than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988).

A. Kimberly Cole, Psy.D.

Dr. Cole completed a psychological evaluation of Ms. Rolland on April 23, 2012, that included an interview, a mental status exam, and a review of "psychotherapy and medical notes, a copy of the SSA application and activities of daily living completed by the claimant." ECF No. 8-7 at 27-32, Tr. 251-256. Dr. Cole diagnosed Ms. Rolland with major depressive disorder, anorexia nervosa, OCD, generalized anxiety disorder, sexual disorder, pathological gambling disorder, and rule out posttraumatic stress disorder. ECF No. 8-7 at 31-32, Tr. 255-256. Dr. Cole opined that Ms. Rolland was currently experiencing difficulties maintaining focus and concentration, her social interactions were becoming non-existent, when facing new and stressful situations she felt nervous and

overwhelmed, and she was "able to follow simple and complex instructions in a controlled environment." ECF No. 8-2 at 32, Tr. 256.

The ALJ gave the opinion of Dr. Cole "some weight" stating that (1) Dr. Cole found Ms. Rolland's impairments to be more severe than supported by the record, (2) Dr. Cole's opinion predated treatment, which improved Ms. Rolland's condition, and (3) Dr. Cole relied exclusively on Ms. Rolland's self-reports. ECF No. 8-2 at 21, Tr. 20.

The ALJ's first reason, that Dr. Cole found Ms. Rolland's impairments to be more severe than supported by the record, is not legally sufficient. Inconsistency with the majority of objective evidence is a specific and legitimate reason for rejecting physician's opinions. *Batson*, 359 F.3d at 1195. But here, the ALJ simply asserted that Dr. Cole found Ms. Rolland's impairments to be more severe than supported by the record without a single citation to the record demonstrating such a lack of severity. ECF No. 8-7 at 21, Tr. 20. The ALJ failed to do more than offer his conclusions; he failed to explain why his conclusion, rather than that of Dr. Cole, was correct. *See Embrey*, 849 F.2d at 421-422. Therefore, this reason is not legally sufficient to support the ALJ's determination giving Dr. Cole's opinion lesser weight.

The second reason provided by the ALJ, that Dr. Cole's opinion predated treatment and treatment improved Ms. Rolland's condition, is also not a legally sufficient reason. The Ninth Circuit has held that reports of improvement in

mental health impairments must be "interpreted with an awareness that improved functioning while being treated and while limiting environmental stressors does not always mean that a claimant can function effectively in a workplace." *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014). Here, the ALJ simply asserted that improvement had occurred. ECF No. 8-7 at 21, Tr. 20; *See Embrey*, 849 F.2d at 421-422. Considering the ALJ provided no discussion or citation to the alleged improvement in the record, the Court is unable to review the determination in accord with *Garrison*. Therefore, the ALJ's second reason is legally insufficient to justify giving Dr. Cole's opinion lesser weight.

The ALJ's third reason, that Dr. Cole relied exclusively on Ms. Rolland's self-report because there were no treatment notes to support her allegations, is not supported by substantial evidence. A doctor's opinion may be discounted if it relies on a claimant's unreliable self-report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). But the ALJ must provide the basis for his conclusion that the opinion was based on the claimant's self-reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

The ALJ's assertion that there were no treatment notes to support Ms. Rolland's allegations is not supported by the record. Dr. Cole's evaluation specifically stated that she reviewed psychotherapy and medical notes. ECF No. 8-7 at 31, Tr. 255. The evaluation was performed at the request of the Division of

Disability Determination Services in connection with Plaintiff's application for benefits; therefore, any records supplied to Dr. Cole would have been a part of the record. ECF No. 8-3 at 5, ECF No. 8-7 at 33, Tr. 70, 257. The only medical evidence received in the file by the April 23, 2012, evaluation were the records from South Hill Family Medicine, known as Exhibit 1F. ECF No. 8-3 at 5, Tr. 70. These records included treatment for an eating disorder, depression, and OCD. ECF No. 8-7 at 3, Tr. 227. Therefore, the ALJ's basis for his conclusion that Dr. Cole's opinion was based on Ms. Rolland's self-reports, i.e. a lack of treatment notes, is not supported by substantial evidence. Thus, this reason is also not legally sufficient for the ALJ to justify giving Dr. Cole's opinion lesser weight.

Considering the treatment of this examining psychologist's opinion and the additional errors made by the ALJ as discussed below, the case is remanded for additional proceedings. On remand, the ALJ will readdress the opinion of Dr. Cole.

B. Margaret Moore, Ph.D.

Dr. Moore testified at the October 31, 2013, hearing and opined that Ms. Rolland would have a moderate limitation in number twenty and a mild to moderate limitation in numbers nine and fifteen. ECF No. 8-2 at 44-45, Tr. 43-44. These numbers refer to a mental medical source statement that the ALJ revised in April 2013 with new definitions. ECF No. 8-2 at 44, Tr. 43. This mental medical source statement is nowhere in the record. The ALJ recreates these limitations in

his decision as "moderately limited in her ability to set realistic goals or make plans independently of others," referring to item twenty, and "mildly to moderately limited in her ability to work in coordination with or proximity to others without being distracted by them and get along with coworkers or peers without distracting them or exhibiting behavioral extremes," referring to items nine and fifteen. ECF No. 8-2 at 21, Tr. 20. But, the ALJ's decision fails to state the "new definitions" contained on the mental medical source statement.

The ALJ gave Dr. Moore's opinion "significant weight" due to her (1) medical expertise, (2) her familiarity with the Social Security regulations, and (3) the consistency of her testimony with the longitudinal medical history, objective medical findings, and other treating and examining opinions. ECF No. 8-2 at 21, Tr. 20. Ms. Rolland challenges the weight the ALJ gave to Dr. Moore's opinion and requests the Court review this portion of the ALJ's determination. ECF No. 12 at 11-15.

The Court is unable to review the opinion because the ALJ's "new definitions" are not contained in the record. Nor does the record contain a narrative RFC opinion from Dr. Moore putting the limitations into functional context. Therefore, Dr. Moore's opinion of mild to moderate and moderate limitations is ambiguous at best. As such, the Court cannot determine if Dr. Moore's opinion was consistent with the longitudinal medical history, objective medical findings, and other treating and examining opinions.

Upon remand, the ALJ is instructed to readdress Dr. Moore's opinion in light of the fact that the opinion is ambiguous as the record currently stands.

C. Joni Marsh, ARNP

Ms. Rolland challenges the weight given to Ms. Marsh's opinion in the ALJ's decision. ECF No. 12 at 10-11.

When it comes to opinion evidence, there is a distinction between acceptable medical sources and other sources. *See* S.S.R. 06-03p. "Accepted medical sources" include licensed physicians, licensed psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language pathologists. 20 C.F.R. §§ 404.1513(a), 416.913(a). "Other sources" include nurse practitioners, physicians' assistants, therapists, teachers, social workers, spouses and other non-medical sources. 20 C.F.R. §§ 404.1513(d), 416.913(d). While the ALJ is required to consider observations by "other sources" regarding how an impairment affects a claimant's ability to work, *Id*., the ALJ can disregard opinion evidence from an "other source," by setting forth reasons "that are germane to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Ms. Marsh is a nurse practitioner, and, therefore, she is not an "accepted medical source," but an "other source." As such, to reject her opinion the ALJ was only required to provide reasons germane to her as a witness.

On September 25, 2013, Ms. Marsh opined that Ms. Rolland was limited to standing one hour at a time, with the ability to stand at least six hours total in an

eight hour work day; Ms. Rolland would need one to two unscheduled breaks each day for thirty minutes each; Ms. Rolland could frequently lift/carry ten pounds, occasionally lift/carry twenty pounds, and never lift/carry fifty pounds; Ms. Rolland could frequently twist, stoop, crouch, climb stairs, and climb ladders; Ms. Rolland would be off task 25% or more of the time; and Ms. Rolland would miss more than four days per month if employed in full time work due to her impairments or treatment. ECF No. 8-7 at 156-158, Tr. 380-382.

The ALJ gave Ms. Marsh's opinion "little weight" because (1) she is not an acceptable medical source, (2) she did not treat Ms. Rolland's mental health impairments, (3) she sympathized for Ms. Rolland or she was pressured by Ms. Rolland, and (4) the opinion was without substantial support from the other evidence of record. ECF No. 8-2 at 21-22, Tr. 20-21.

The ALJ's first reason for rejecting Ms. Marsh's opinion, that she was not an acceptable medical source, is not a sufficient reason. The ALJ is required to consider evidence supplied by other sources. 20 C.F.R. §§ 404.1513(d), 416.913(d). Therefore, the fact that someone is an other source alone is not a sufficient reason to reject a lay witness' opinion.

The ALJ's second reason for rejecting Ms. Marsh's opinion, that Ms. Marsh did not treat Ms. Rolland's mental health impairments and, therefore, her opinions regarding Ms. Rolland's mental impairments were disregarded, is a legally sufficient reason. Ms. Marsh treated Ms. Rolland for her physical impairments and

encouraged her to continue seeking treatment for mental health impairments. ECF No. 8-7 at 152, Tr. 376. Therefore, this reason is germane to Ms. Marsh, and a legally sufficient reason to reject her opinion of Ms. Rolland's mental functional limitations, but not her opinion as to Ms. Rolland's physical limitations.

The third reason given by the ALJ, that Ms. Marsh's opinion was a result of sympathy for Ms. Rolland or that Ms. Rolland pressured her to complete the form, is not supported by substantial evidence. The ALJ failed to provide a single citation to the record showing that Ms. Marsh was persuaded to misrepresent Ms. Rolland's functional ability due to sympathies or patient pressure. ECF No. 8-2 at 21, Tr. 20. The evaluation report associated with the opinion simply states "Needs document completed for lawyer. Court date for SSI on October 31." ECF No. 8-7 at 150, Tr. 374. There is no evidence in the record to support the ALJ's assertion that Ms. Marsh's opinion was misrepresented due to her sympathies or pressure from Ms. Rolland. Therefore, the ALJ's third reason is not supported by substantial evidence.

The ALJ's fourth reason for rejecting Ms. Marsh's opinion, that the opinion is without substantial support from the other evidence of record, is not legally sufficient. It is improper for the ALJ to discredit testimony of an "other source" because it was not supported by medical evidence in the record. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). Here, the ALJ notes that Ms. Rolland failed to claim her eye infections as a disabling impairment on application and no

examining or treating providers opined that she was unable to work at the light or sedentary exertional levels. ECF No. 8-2 at 21-22, Tr. 20-21.

By noting these specifics, the ALJ appeared to find that Ms. Marsh's opinion was inconsistent with Ms. Rolland's allegations on application and inconsistent with the other opinions in the record. An ALJ may discount lay testimony if it conflicts with the medical evidence in the record. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). But these specifics noted by the ALJ are not inconsistent with Ms. Marsh's opinion.

First, Ms. Rolland's alleged impairments on application is irrelevant in relation to Ms. Marsh's opinion. It may speak to Ms. Rolland's credibility or insight into her own limitations, but it has no merit in assessing the weight given to Ms. Marsh's opinion. Second, Ms. Marsh's opinion is the only opinion from an examining or treating provider as to Ms. Rolland's physical limitations. The remaining opinions of examining or treating providers are limited to mental health providers. Furthermore, Ms. Marsh does not opine that Ms. Rolland is unable to perform work at the light or sedentary exertional levels. She opines that Ms. Rolland is capable of work at these exertional levels, but that she is unable to sustain the work activity. ECF No. 8-7 at 156-158, Tr. 380-382.

As such, the ALJ failed to cite a legally sufficient reason supported by substantial evidence to reject Ms. Marsh's opinion as to Ms. Rolland's physical

limitations. On remand, the ALJ is instructed to readdress the opinion of Ms. Marsh.

II. Mother's Testimony

Ms. Rolland challenges the ALJ's determination that the testimony of her mother, Patricia Rolland, was entitled to "little weight." ECF No. 12 at 15-16.

Lay witness testimony cannot establish the existence of medically determinable impairments. C.F.R. 20 C.F.R. § 416.913(d)(a). But lay witness testimony is "competent evidence" as to "how an impairment affects [a claimant's] ability to work." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050 (9th Cir. 2006); 20 C.F.R. § 416.913(d)(4); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-919 (9th Cir. 1993) ("[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to her condition."). An ALJ must give reasons germane to the witness to discount evidence from the lay witnesses. *Nguyen v. Chater*, 100 F.3d at 1467.

The ALJ rejected Patricia's testimony because (1) she had no medical training, (2) her relationship to Ms. Rolland meant she could not be considered a disinterested third party, and (3) the statement was not consistent with the opinions and observations by medical doctors. ECF No. 8-2 at 22, Tr. 21.

The ALJ's first reason, that Patricia had no medical training, is not a legally sufficient reason. The ALJ is required to consider evidence supplied by lay witnesses. 20 C.F.R. §§ 404.1513(d), 404.913(d). Therefore, the fact that

someone is a lay witness alone is not a sufficient reason to reject evidence supplied by a lay witness.

The ALJ's second reason, that Patricia's familiar relationship with Ms. Rolland meant that she could not be considered a disinterested third party, is not a legally sufficient reason. The mere fact that a lay witness has a close relationship with the claimant "cannot be a ground for rejecting his or her testimony." *Smolen*, 80 F.3d at 1289. "To the contrary, testimony from lay witnesses who see the claimant every day is of particular value." *Id*.

The Commissioner cites *Greger v. Barnhart*, 464 F.3d 968 (9th Cir. 2006), for the proposition that lay testimony may be rejected where the witness and the claimant have a close relationship. ECF No. 14 at 18. The Commissioner's reliance on *Greger* is misplaced. The witness's testimony in *Greger* was rejected *in part* because it was inconsistent with the claimant's presentations to treating physicians. 464 F.3d at 972. While the ALJ in *Greger* noted the close relationship between the witness and the claimant, the relationship was not the sole reason for rejecting the witness's testimony. This is in contrast to the witness in *Smolen* whose opinion was dismissed on the sole grand that she was related to the claimant. 80 F.3d at 1289. Here, the ALJ provided two reasons for rejecting Patricia's opinion in addition to her familiar relationship, but since those two additional reasons have been deemed to be legally insufficient, the ALJ cannot rely

solely on a familiar relationship to dismiss Patricia's opinion. Therefore, this is not a legally sufficient reason.

The ALJ's third reason for rejecting Patricia's testimony, that it was inconsistent with the medical records, is not a legally sufficient reason. It is improper for the ALJ to discredit testimony of a lay witness because it was not supported by medical evidence in the record. *Bruce*, 557 F.3d at 1116. Therefore, the ALJ failed to support his rejection of Patricia's testimony with legally sufficient reasons.

On remand, the ALJ is instructed to readdress the statement made by Patricia Rolland.

III. RFC

Ms. Rolland challenges the ALJ's RFC determination stating that the ALJ failed to consider all impairments from both severe and non-severe impairments. ECF No. 12 at 17-18. Ms. Rolland asserts that the ALJ violated S.S.R. 96-8p in failing to consider any limitations resulting from her Interstitial Keratitis, OCD, and fatigue. ECF No. 12 at 17-18.

A claimant's RFC is "the most [a claimant] can still do despite [her] limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(c) (defining RFC as the "maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs."). In formulating a RFC, the ALJ weighs medical and other

source opinions and also considers the claimant's credibility and ability to perform daily activities. See, e.g., *Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

Considering the ALJ has been instructed to reconsider the weight provided to the opinions of medical sources and other sources upon remand, the ALJ is further instructed to form a new RFC on remand. In making his new RFC determination, the ALJ is instructed to follow S.S.R. 96-8p and consider all of Ms. Rolland's limitations.

IV. Past Relevant Work

Ms. Rolland challenges the ALJ's determination that her past work as a count team/pull-tabs/bookkeeper qualifies as past relevant work. ECF No. 12 at 19-20.

Past relevant work is defined as "work that you have done in the past 15 years, that was substantial gainful activity, and that lasted long enough for you to learn to do it." 20 C.F.R. §§ 404.1560(b)(1), 416.960(b)(1). The ALJ stated that Ms. Rolland was able to perform this work at "very nearly substantial gainful activity levels." ECF No. 8-2 at 22, Tr. 21. Thus, the ALJ acknowledged that the work was not performed at substantial gainful activity levels. Therefore, under the regulations the work cannot qualify as past relevant work. The ALJ's step four determination that Ms. Rolland was able to perform past relevant work is in error.

The ALJ is instructed to readdress step four upon remand and elicit testimony from Ms. Rolland and a vocational expert to determine past relevant work and to determine if Ms. Rolland has an RFC that is compatible with past relevant work.

V. Application of the Grids

Ms. Rolland challenges the ALJ's application of the grids in this case. ECF No. 12 at 16-19.

After a claimant has established a prima facie case of disability by demonstrating she cannot return to her former employment, the burden shifts to the ALJ to identify specific jobs existing in substantial numbers in the national economy that claimant can perform despite her identified limitations. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986). The ALJ can satisfy this burden by either (1) applying the grids or (2) taking the testimony of a vocational expert. *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988).

The grids are an administrative tool the Commissioner may rely on when considering claimants with substantially uniform levels of impairment. *Burkhart*, 856 F.2d at 1340 (citing *Derosiers v. Secretary of Health and Human Serv.*, 846 F.2d 573, 578 (9th Cir. 1988). However, the use of the grids is not always proper. If a claimant has non-exertional limitations that significantly limits her range of work, the use of the grids in determining disability is inappropriate. *Bates v. Sullivan*, 894 F.2d 1059 (9th Cir. 1990) overruled on other grounds *Bunnell v.*

Sullivan, 947 F.2d 341, 342 (9th Cir. 1991). In such instances, a vocational expert must be called to identify jobs that match the abilities of the claimant, given her limitations. See, e.g., *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). Nevertheless, if an ALJ determines that a claimant's non-exertional limitations do not significantly affect her ability to perform a full range of work, then use of the grids is appropriate. *Tacket*, 180 F.3d at 1101.

Here, the ALJ gave Ms. Rolland only non-exertional limitations in the RFC determination: "the claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following mental non-exertional limitations: she can perform simple to moderately detailed work, with clearly stated goals and only occasional contact with co-workers, supervisors, and the general public." ECF No. 8-2 at 19, Tr. 18. As noted above, if non-exertional limitations "significantly" affect a claimant's ability to perform work, then vocational expert testimony is required. *Bates*, 894 F.2d at 1059.

Here, the ALJ found that the non-exertional limitations only "slightly compromised" Ms. Rolland's ability to perform work at all exertional levels. ECF No. 8-2 at 23, Tr. 22. Despite this finding, the ALJ only gave non-exertional limitations resulting from two impairments he found as severe. Therefore, these non-exertional impairments significantly affected Ms. Rolland's ability to perform work and a vocational expert should have been called to testify. The application of the grids by the ALJ was inappropriate.

The ALJ is instructed to readdress his step five determination on remand and elicit testimony from a vocational expert.

REMEDY

Further proceedings are necessary for the ALJ to evaluate and weigh medical source opinions and other source opinions, to form a new RFC determination, to determine Ms. Rolland's past relevant work, and to complete new step four and step five determinations. The ALJ will also need to supplement the record with any outstanding or additional medical evidence and elicited testimony from a vocational expert.

CONCLUSION

Accordingly, **IT IS ORDERED**:

1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 12,** is **GRANTED**, and the matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

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3. Application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff** and the file shall be **CLOSED**.

DATED this 25th day of March 2016.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge